Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

CAMERON F. MACRAE
Attorney for Edison Electric Institute
140 Broadway
New York, New York 10005

Of Counsel:
RONALD D. JONES
JACOB FRIEDLANDER
HOWARD S. OCKMAN
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

November, 1979

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Interest of Edison Electric Institute	1
ARGUMENT	3
I. The Public Service Commission's order prohibiting utilities from communicating their views to their customers on "controversial issues of public policy" by means of bill inserts is invalid as a denial of freedom of speech under the First Amendment	3
A. The speech sought to be controlled is at the core of First Amendment protection	3
B. The Commission's ban is a content-based restriction impermissible under the First and Fourteenth Amendments	5
C. No compelling state insterest sufficient to justify the Commission's ban has been demonstrated	7
II. The Commission's ban of bill inserts discussing "controversial issues of public policy" while encouraging inserts providing "non-controversial" and "useful" information is unconstitutionally vague	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES:	PAGE
Abood v. *District Board of Education*, 431 U.S. 209 (1977)	11
Baggett v. *Bullitt*, 377 U.S. 360 (1964)	13
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977)	5
Blount v. *Rizzi*, 400 U.S. 410 (1971)	11
Brandenburg v. *Ohio*, 395 U.S. 444 (1969)	6
Buckley v. *Valeo*, 424 U.S. 1 (1975)	3, 5 12, 13
Carey v. *Population Services International*, 431 U.S. 678 (1977)	5
Coates v. *Cincinnati*, 402 U.S. 611 (1971)	14
Cohen v. *California*, 403 U.S. 15 (1971)	10, 13
Columbia Broadcasting System v. *Democratic National Committee*, 412 U.S. 94 (1973)	12
Cramp v. *Board of Public Instruction*, 368 U.S. 278 (1961)	13
Elrod v. *Burns*, 427 U.S. 347 (1976)	7
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975)	10
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978)	3, 4, 5 7, 13
Friedman v. *Rogers*, 440 U.S. 1 (1979)	5n
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	13
Hess v. *Indiana*, 414 U.S. 105 (1973)	6
Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976)	9, 13
Keyishan v. *Board of Regents*, 385 U.S. 589 (1967)	13
Kovacs v. *Cooper*, 336 U.S. 77 (1949)	6
Lamont v. *Commissioner of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y. 1967)	9
Lamont v. *Postmaster General*, 381 U.S. 301 (1965)	10, 11

CASES:	PAGE
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974)	8
Martin v. *Struthers*, 319 U.S. 141 (1943)	7, 9
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974)	12
NAACP v. *Alabama*, 357 U.S. 449 (1958)	4
NAACP v. *Button*, 371 U.S. 415 (1963)	13
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	3
Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972)	14
Police Department of Chicago v. *Mosley*, 408 U.S. 92 (1972)	6
Public Utilities Commission v. *Pollak*, 343 U.S. 451 (1952)	8n
Red Lion Broadcasting Co. v. *Federal Communications Comm.*, 395 U.S. 367 (1969)	7
Roth v. *United States*, 354 U.S. 476 (1957)	5
Rowan v. *United States Post Office Department*, 397 U.S. 728 (1970)	8, 11
Smith v. *Goguen*, 415 U.S. 566 (1974)	13
Speiser v. *Randall*, 357 U.S. 513 (1958)	13
Street v. *New York*, 394 U.S. 576 (1969)	10
Thornhill v. *Alabama*, 310 U.S. 88 (1940)	4
United States v. *O'Brien*, 391 U.S. 367 (1968)	6
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)	3n, 5, 6

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of appellant Consolidated Edison Company of New York, Inc. ("Consolidated Edison") in the captioned appeal from a judgment of the Court of Appeals of the State of New York entered in this case on May 1, 1979. In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for both parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk.

Interest of Edison Electric Institute

Edison Electric Institute is the principal national association of electric utility companies. Its members serve 99.1 percent of all customers of the investor-owned segment of

the utility industry and supply 77.1 percent of the nation's electricity. The decision of the Court of Appeals of the State of New York from which this appeal is taken concerns a vital interest of EEI and its members—their unhindered freedom to communicate their views on controversial issues of public policy.

As questions of energy supply and distribution have moved to the forefront of national attention, the freedom of utilities to participate in the resulting public debate has gained in significance. By virtue of its need to remain competitive in the field of energy supplies, the utility industry is possessed of accurate and informed data on many issues of vital concern to our society. Such issues include the use of alternate power plant fuels to decrease dependency on foreign oil imports, the effect of environmental costs on utility rates, and the need for development of alternative energy sources, including solar and geothermal power. Confusion and indecision are rampant in these areas as the nation struggles toward the formation of a coherent energy policy. The free flow of information and ideas on such vital issues has become essential for the effective functioning of our democratic process. Any attempt to impair the interchange of ideas on these subjects is detrimental, not only to EEI's utility members throughout the country, but to society as a whole.

ARGUMENT

I

The Public Service Commission's order prohibiting utilities from communicating their views to their customers on "controversial issues of public policy" by means of bill inserts is invalid as a denial of freedom of speech under the First Amendment.

A. *The speech sought to be controlled is at the core of First Amendment protection.*

The Public Service Commission's ("Commission") order prohibits discussion of "controversial issues of public policy" in bill inserts. By its very terms, the ban strikes at speech which is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978). The need for free and open debate on issues of public concern has traditionally been at the core of protected speech.* This Court has repeatedly emphasized the importance of speech such as that involved in this ban, voicing a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1975).

By restricting the communication of views on controversial issues, the Commission's ban unduly restrains free ex-

---

* Although the Court of Appeals did not characterize the type of speech involved in the ban, the Commission erroneously suggested below that the bill inserts constituted "advertising" (A. at 41a-43a) and were, therefore, entitled to somewhat lesser protection than traditional categories of free speech under *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). See, e.g., Brief for Respondent Public Service Commission of the State of New York on Appeal to the Court of Appeals of the State of New York, pp. 10-16.

pression by the electric utilities. "Effective advocacy of both public and private points of view, *particularly controversial ones,*" has been recognized by this Court as essential to the protection of First Amendment rights. *NAACP* v. *Alabama,* 357 U.S. 449, 460 (1958) (emphasis added). By limiting the permissible subject matter of bill inserts to "non-controversial," "useful" topics (A. at 43a)*, the Commission has improperly and severely limited the ability of the utilities to communicate both information and their own views on issues of importance to them and to the general public. This restriction is contrary to this Court's holding that:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 101-102 (1940), quoted in *First National Bank of Boston, supra,* at 776.

By proscribing the use of bill inserts "as a mechanism for the dissemination of the *utility's position* on controversial matters of public policy" (A. at 58a, emphasis added), the Commission has imposed restraints on the expression of one point of view in all areas of public controversy. This prohibition impairs the "unfettered interchange of ideas" which this Court has found essential "for the bringing about of political and social changes desired by the people."

* All references to appendices refer to the Appendix to the Jurisdictional Statement filed by Consolidated Edison on July 27, 1979.

Roth v. *United States,* 354 U.S. 476, 484 (1957), *Buckley, supra,* at 14.

It is now settled that the fact that a corporation is the source of speech does not diminish or alter the character of the protection afforded by the First and Fourteenth Amendments. *First National City Bank of Boston, supra,* at 777. Electric utilities are no different from other corporations in this respect. Nor is the mere fact that the electric utilities are a regulated industry a justification for restricting their right to be heard on issues of vital importance to society. Even in the area of commercial advertising, this Court has recognized the right of speakers under extensive regulation to First Amendment protection. *Virginia Pharmacy, supra; Carey* v. *Population Services Int.,* 431 U.S. 678 (1977); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).* The protection afforded to regulated industry in the area of speech on controversial issues of public policy should be no less. This is particularly so where, as in the case at bar, we are concerned with a state regulation of speech which is not only traditionally strongly protected, but where the regulation goes directly to the content of the prohibited speech.

B. *The Commission's ban is a content-based restriction impermissible under the First and Fourteenth Amendments.*

The essence of the First Amendment was expressed by Mr. Justice Marshall when he wrote that "above all else, the First Amendment means that government has no power

* In the recent commercial speech case of *Friedman* v. *Rogers,* 440 U.S. 1 (1979), this Court permitted state regulation of the use of trade names by optometrists only after finding that trade names are "a form of commercial speech that has no intrinsic meaning" and that the restriction had "only the most incidental effect on the content" of the regulated speech. *Id.* at 12, 16.

to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). Although appropriate "time, place and manner" restrictions have been recognized as valid, *Kovacs* v. *Cooper,* 336 U.S. 77 (1949), such restrictions, to be valid, must be content-neutral, be supported by a significant government interest, and not foreclose alternative channels of expression.* *Virginia Board of Pharmacy, supra,* at 771.

The regulations enacted by the Commission are not content-neutral. The ban goes directly to the subjects which may be discussed in the bill inserts. The Commission has sought to preserve the medium of bill inserts for those communications which it deems to be "useful" for the public to hear while banning discussion of controversial issues.

Government regulation designed to suppress traditional communicative activity, such as the speech here at issue, because of its content or potential impact is subject to the most rigorous scrutiny. Absent some compelling justification, such as a likelihood that speech will incite "imminent lawless action," content-oriented restrictions may not stand. *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969); see *Hess* v. *Indiana,* 414 U.S. 105 (1973); *United States* v. *O'Brien,* 391 U.S. 367 (1968). The Commission, here, has not shown any actual or impending public danger which would justify a ban on discussion of all "controversial issues" by utilities in their bill inserts. It has, instead, merely voiced its

* The utilities have no equivalent alternative means of communication. The medium of bill inserts is a relatively inexpensive mode of communication. It is in the interests of the regulated industry as well as of the public, as ratepayers, for the utilities to use the most economical form of expression available. If access to such an effective, cost-efficient forum is prohibited, the electric utilities will be severely restricted in their ability to express their views and to provide the public with data relevant to important public issues.

opinion that such discussion is not "useful" to the consumer. Such an infringement on the First Amendment rights of the utilities should not be allowed to stand.

Furthermore, the Commission's attempt to categorize the content of proposed speech as "useful" or "not useful" for the consumer to receive in bill inserts is an invalid exercise of regulatory power in violation of the First Amendment. As this Court has determined, regulators may not be permitted "to vindicate [their] own idiosyncratic conception of the public interest." *Red Lion Broadcasting Co.* v. *Federal Communications Comm.,* 395 U.S. 367, 395 (1969). The individual in our society must have the discretion to determine what information is "useful" to him. The Commission may not substitute its own judgment in these matters for that of the public. *Martin* v. *Struthers,* 319 U.S. 141 (1943). In *Martin,* this Court invalidated an ordinance banning door-to-door distribution of literature because the ordinance substituted the judgment of the community for that of the individual. It is for the individual, not the regulator, to determine those views which are worthy of his attention. An attempt by the state to control the content of speech according to its purported usefulness is an invalid infringement on the fundamental right to freedom of speech.

C. *No compelling state interest sufficient to justify the Commission's ban has been demonstrated.*

At various stages of the proceeding in this case, different rationales have been advanced by the Commission and the courts to justify the Commission's ban. None of these rationales includes anything approaching a compelling government interest which can withstand the "exacting scrutiny" mandated by this Court where protected speech is concerned. *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976); *First National City Bank, supra,* at 786.

In upholding the Commission's order, the Court of Appeals of the State of New York found a government interest in the protection of the privacy of recipients of the bill inserts. It relied primarily on this Court's opinion in *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). Upon consideration, however, it is obvious that the decision in *Rowan* is completely inapposite to the case at bar. *Rowan* involved the constitutionality of a statute pursuant to which the Postmaster General might order the sender of unsolicited "pandering" material to stop sending it if the recipient of such material so requested. In the case at bar, not only does the ban operate to prohibit communications which are not patently offensive, but it does so upon its own initiative without requiring any action by the intended recipients.

The privacy interests invoked by the Court of Appeals are not in fact threatened in any meaningful way. Expression of views on "controversial issues of public policy" is not inherently offensive, nor is the form of communication unduly intrusive. There is no "captive audience" involved here as there was in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974).* The recipient of bill inserts is entirely free to discard them unread. Indeed, the mailbox

> "is hardly the kind of enclave that requires constitutional defense to protect the privacies of life. The short, though regular, journey from mailbox to trash can . . . is an acceptable burden." *Lamont* v. *Commissioner of Motor Vehicles,* 269 F.Supp. 880, 883 (S.D.N.Y. 1967).

---

* Mr. Justice Douglas, who first gave the "captive audience" doctrine judicial recognition, noted that coercion is a necessary element of the doctrine. He captured the essence of this concept in *Public Utilities Commission* v. *Pollak,* 343 U.S. 451 (1952), writing:

> "The present case involves a form of coercion to make people listen . . . [T]he man on the streetcar has no choice but to sit and listen, or perhaps to sit and try *not* to listen." *Id.* at 468-69 (Douglas, J., dissenting opinion). (emphasis in original).

In the present case, the recipient of a bill insert is no more compelled to sit and read it than is the recipient of any piece of mail containing views with which he does not agree or in which he is not interested.

This Court has protected the rights of door-to-door solicitors against similar attacks. *Hynes* v. *Mayor of Oradell,* 425 U.S. 610 (1976); *Martin* v. *Struthers,* 319 U.S. 141 (1943). In *Martin,* Mr. Justice Black, writing for the Court, noted:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." 319 U.S. at 146-147.

Certainly, the mailing of bill inserts is less inherently intrusive than the physical presence of a canvasser in the doorway. And the effort required to be made by the recipient of the insert in discarding it unread is certainly no more burdensome than the effort involved in turning a canvasser away unheard. Indeed, it is the right as well as the responsibility of the individual in our society to make such decisions.

The Commission's ban is, therefore, invalid as an attempt to protect the privacy of those who may find the bill inserts objectionable. The government's interest in the recipients' privacy is not sufficiently compelling to justify

such a ban. In the absence of such interest the restriction fails to survive the standard of scrutiny required by the First and Fourteenth Amendments.

Furthermore, speculation that some recipients may find the proscribed contents of the bill inserts offensive, as the Court of Appeals has asserted (A. at 10a), is no justification for the imposition of a government ban. This Court has repeatedly affirmed the pre-eminence of speakers over unwilling listeners in the absence of coercion. *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975); *Cohen* v. *California,* 403 U.S. 15 (1971); *Street* v. *New York,* 394 U.S. 576 (1969). In *Street,* Mr. Justice Harlan, writing for the Court, noted:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 592.

This Court has expressed concern about the ability of government agencies to make adequate determinations as to what is or is not offensive. As Mr. Justice Harlan, in *Cohen, supra,* wrote:

> "Indeed, we think it is largely because government officials cannot make principled distinctions in this area [between offensive and non-offensive words] that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

In the past this Court has refused to allow government control of the mails based on a regulator's concept of what matters would be "offensive" to the recipient. As this Court wrote in *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), "the use of the mails is almost as much a part of free speech as the right to use our tongues . . ." *Id.* at

305. See also, *Blount* v. *Rizzi,* 400 U.S. 410 (1971) which invalidated an attempt to vest in the Postmaster General power similar to that accorded individual addressees in *Rowan, supra.*

In *Lamont* v. *Postmaster General, supra,* this Court invalidated a postal regulation which required the addressee of "communist propaganda" to affirmatively request its delivery. The ostensible purpose of the regulation was to shield addressees from unwarranted "offensive" mail. The Commission's total ban on discussion of controversial topics in bill inserts appears to be even more objectionable than the partial restraint struck down in *Lamont.* In the case at bar, even those customers who wish to receive information concerning the utilities' informed opinions on controversial issues will be prevented from doing so.

There is no valid government interest in shielding consumers from exposure to ideas the Commission arbitrarily determines may be offensive to some of them. Insofar as the Commission's ban is based on an attempt to do so, it is an unconstitutional infringement on speech protected by the First Amendment.

Other possible interests advanced by the Commission to justify such a severe restriction on freedom of speech will not withstand "exacting scrutiny." The use of bill inserts does not involve a "forced subsidy" (A. at 67a) such as that at issue in *Abood* v. *District Board of Education,* 431 U.S. 209 (1977). In *Abood,* dissenting union members were forced to make tangible out-of-pocket contributions to candidates whom they opposed. In the present case, the dissemination of the utilities' message through bill inserts imposes no additional costs whatever on ratepayers who may or may not disagree with the utilities' position.

Nor are bill inserts a scarce medium analogous to physically limited radio and television bands. (A. at 66a). They are, if anything, an economically limited resource analogous to newspapers. This Court has refused to permit the regulation of newspapers in the public interest merely because economic considerations limit the number of newspapers published. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). Even when dealing with electronic media, the most closely regulated mode of speech in our society, the Federal Communications Commission ("FCC") has never sought to decide what was most "useful" for listeners to hear. See, *e.g., Columbia Broadcasting System* v. *Democratic National Committee,* 412 U.S. 94 (1973). Surely, the Commission cannot claim greater power to control the content of the utilities' speech than that asserted by the FCC over the electronic media.

The Commission has also alleged that the use of bill inserts provides the utilities with an unfair advantage in disseminating their views. (A. at 64a-65a) In effect, the Commission has sought to "equalize" speech by prohibiting one speaker from utilizing a given method of communication. However, this Court in *Buckley, supra,* emphatically rejected the notion that speech imbalance may be redressed by imposing direct restraints on communication.

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. *Id.* at 48-49.

Thus, to the extent that the Commission seeks to uphold the direct restraint upon the utilities' speech to prevent an "unfair advantage" in the dissemination of information and opinions, it is in clear violation of the First Amendment.

I I

The Commission's ban of bill inserts discussing "controversial issues of public policy" while encouraging inserts providing "non-controversial" and "useful" information is unconstitutionally vague.

This Court has consistently held that whenever the state seeks to regulate speech, it must act with a high degree of specificity. *First National Bank of Boston, supra,* at 785, n. 21. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U.S. 415, 438 (1963). An enactment is void for vagueness under the principles of due process if its prohibitions are not clearly defined. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108 (1972); *Hynes* v. *Mayor of Oradell, supra,* at 620-21; *Buckley, supra,* at 40-41. The existence of a vague prohibition on communicative activity chills expression which persons fear may fall within the prohibition and is, therefore, invalid. "When one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone." *Keyishan* v. *Board of Regents,* 385 U.S. 589, 604 (1967); *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). See also, *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961).

Vague regulations turn the official charged with enforcing them into a discretionary censor. Such overbroad discretion may empower the Commission "to silence dissidents simply as a matter of personal predilections." *Cohen, supra,* at 21. See also, *Smith* v. *Goguen,* 415 U.S. 566, 575-576, (1974). As Chief Justice Burger, writing for the Court in *Hynes, supra,* noted:

> "Nor does the ordinance provide explicit standards for those who apply it. To the extent that these am-

> biguities . . . give police the *effective* power to grant or deny permission to canvas for political causes, the ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell,* and *Staub.* See also *Papachristou* v. *City of Jacksonville,* 405 U.S. 156, 162 (1972); *Coates* v. *Cincinnati,* 402 U.S. 611 614 (1971)." 425 U.S. at 622 (emphasis in the original).

In the instant case, the ban is so vague as to prevent the utilities from being certain as to what the Commission considers prohibited. In addition, by its order, the Commission has vested in itself the absolute power to determine what is "useful" and "non-controversial."

The uncertainty inherent in the regulation is evidenced by the Commission's admission that it may be necessary for it to render advance opinions as to what it will permit to appear in the inserts. (A. at 68a). The Commission's willingness to provide such case-by-case determinations in no way affects the essential vagueness and uncertainty caused by its order. The need for such individualized decisions merely illustrates the fact that the Commission itself has been unable to articulate a clear and explicit standard. In fact, members of the Commission itself have not always agreed on what should constitute "useful" information. While the majority specifically excluded from this category "materials . . . concerning the development of nuclear power," (A. at 43a), then Chairman Alfred E. Kahn stated that he "would be inclined to agree" with utility managements that it is in the public interest for them to continue "to present their views on the merits of nuclear energy." (A. at 55a). Mr. Kahn would have preferred that such communications be treated as a sub-topic of "institutional advertising."

Putting the power in the hands of the Commission to issue continuing subjective and arbitrary interpretations of an inherently vague regulation is a violation of the due process clause. Such standardless discretion, even if exercised in good faith, must render the regulations unconstitutional under the First and Fourteenth Amendments.

CONCLUSION

The Commission's ban on discussion of "controversial issues of public policy" in utility bill inserts is an unconstitutional infringement on the utilities' freedom of speech. The ban is content-based, striking at speech on controversial issues—speech which is at the very heart of First Amendment protection. No valid government interest is served by this ban which is so inherently vague as to be void under the First and Fourteenth Amendments. Therefore, the Commission's attempt to impair the fundamental freedom of the utilities to speak is unconstitutional and should not be condoned by this Court.

Respectfully submitted,

CAMERON F. MACRAE
Attorney for Edison Electric Institute
140 Broadway
New York, New York 10005

Of Counsel:

RONALD D. JONES
JACOB FRIEDLANDER
HOWARD S. OCKMAN
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

November, 1979